

David S. Kupetz (CA Bar No. 125062)  
 dkupetz@sulmeyerlaw.com  
 Steven F. Werth (CA Bar No. 205434)  
 swerth@sulmeyerlaw.com  
**SulmeyerKupetz**  
 A Professional Corporation  
 333 South Hope Street, Thirty-Fifth Floor  
 Los Angeles, California 90071-1406  
 Telephone: 213.626.2311

(Proposed) Bankruptcy Counsel for Simo  
 Holdings, Inc., Debtor and Debtor in  
 Possession

**UNITED STATES BANKRUPTCY COURT**  
**Southern District of California**

In re

**SIMO HOLDINGS, INC.,**  
 a California corporation,

Debtor.

Case No. 11-02898-11

**DATE:** March 1, 2011  
**TIME:** 9:00 a.m.  
**JUDGE:** Hon. Margaret M. Mann  
**PLACE:** Chamber 1—Room 218  
 U.S. Bankruptcy Court  
 325 West "F" Street  
 San Diego, CA 92101

Chapter 11

**DEBTOR'S FIRST DAY MOTION  
 PURSUANT TO SECTION 363(c) OF  
 THE BANKRUPTCY CODE AND  
 RULE 4001(b) OF THE FEDERAL  
 RULES OF BANKRUPTCY  
 PROCEDURE FOR INTERIM AND  
 FINAL ORDERS AUTHORIZING USE  
 OF CASH COLLATERAL;  
 MEMORANDUM OF POINTS AND  
 AUTHORITIES**

[Omnibus Declaration of Mark Simo in  
 Support "First Day" Motions Filed  
 Concurrently Herewith]

Employer ID# 93-1037856

SulmeyerKupetz, A Professional Corporation  
 333 SOUTH HOPE STREET, THIRTY-FIFTH FLOOR  
 LOS ANGELES, CALIFORNIA 90071-1406  
 TEL: 213.626.2311 • FAX 213.629.4520

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SulmeyerKupetz, A Professional Corporation  
 333 SOUTH HOPE STREET, THIRTY-FIFTH FLOOR  
 LOS ANGELES, CALIFORNIA 90071-1406  
 TEL. 213.626.2311 • FAX 213.629.4520

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1 TO THE HONORABLE MARGARET M. MANN, UNITED STATES  
 2 BANKRUPTCY JUDGE, THE OFFICE OF THE UNITED STATES TRUSTEE,  
 3 SECURED CREDITORS OF RECORD, THE TWENTY LARGEST UNSECURED  
 4 CREDITORS, AND INTERESTED PARTIES:

5 **EMERGENCY MOTION**

6 Through this Emergency Motion for Interim and Final Orders  
 7 Authorizing Use of Cash Collateral Pursuant to Section 363(c) of the Bankruptcy  
 8 Code and Rule 4001(b) of the Federal Rules of Bankruptcy Procedure (the  
 9 "Motion"), Simo Holdings, Inc. (the "Debtor" or "Simo Holdings"), the debtor and  
 10 debtor in possession in the above-captioned case, seeks the entry of interim and  
 11 final orders authorizing the Debtor to use cash collateral pursuant to 11 U.S.C.  
 12 § 363(c)(2)(B) and (c)(3) and Rule 4001(b)(2) of the Federal Rules of Bankruptcy  
 13 Procedure. This Motion is brought in accordance with Local Bankruptcy Rule  
 14 9014-5 and this Court's "Guidelines For First Day Motions" in Appendix D-1 and D-2 to  
 15 the Local Bankruptcy Rules, as it is a matter which must be addressed immediately in  
 16 order to ensure the least possible disruption to the debtor's ongoing business operations  
 17 and thereby enhance the chances for success in chapter 11.

18 This Motion is made and based upon the moving papers, the attached  
 19 Memorandum of Points and Authorities and the concurrently filed Omnibus  
 20 Declaration of Mark Simo in support of "First Day" motions (the "Simo Decl."), the  
 21 arguments and representations of counsel and any oral or documentary evidence  
 22 presented at the time of the hearing.

23 **WHEREFORE** the Debtor respectfully requests that the Court enter  
 24 an order:

25 (1) granting this Motion;

26 ///

27 ///

28 ///

1 (2) authorizing the use of cash collateral pursuant to 11 U.S.C.  
2 § 363(c)(2)(B) and (c)(3) and Rule 4001(b)(2) of the Federal Rules of Bankruptcy  
3 Procedure; and

4 (3) granting such other and further relief as this Court deems just  
5 and proper under the circumstances.

6 DATED: February 24, 2011

**SulmeyerKupetz**  
A Professional Corporation

7  
8  
9 By: 

10 Steven F. Werth  
11 (Proposed) Bankruptcy Counsel for Simo  
12 Holdings, Inc., Debtor and Debtor in  
13 Possession  
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SulmeyerKupetz, A Professional Corporation  
333 SOUTH HOPE STREET, THIRTY-FIFTH FLOOR  
LOS ANGELES, CALIFORNIA 90071-1406  
TEL. 213.626.2311 • FAX 213.629.4520

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I.**

**JURISDICTION AND SUMMARY OF RELIEF REQUESTED**

This Court has jurisdiction to consider the foregoing motion (the "Motion") under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (M) and (O). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. Pursuant to the Motion, the Debtor seeks authority to use cash collateral to pay its ordinary and necessary operating expenses. The statutory predicates for the relief requested herein are 11 U.S.C. §§ 363(c)(2)(B) and (c)(3) under which the Debtor seeks authority to use cash collateral.

**II.**

**PRELIMINARY STATEMENT AND NEED FOR HEARING**

**ON AN EMERGENCY BASIS**

The Debtor commenced this case by filing a voluntary chapter 11 petition on February 24, 2011 (the "Petition Date"). The Debtor continues to manage and operate its business as a debtor in possession. The Debtor seeks authority from the Court to use cash collateral to pay its ordinary and necessary expenses and generally operate its business and meet administrative expenses. The Debtor's immediate access to cash is absolutely critical to maximizing the value of the estate. The Debtor requires the use of cash collateral to maintain its operations, pay ordinary operating expenses, and replenish its inventory. In order to maintain operations without disruption thereby preserving the value of the estate, the Debtor must be permitted to pay in the ordinary course, among others, its employees, shippers, vendors, utility providers, and suppliers. As such, a hearing on an emergency basis is required and appropriate.

There are only two entities with an interest in the cash collateral of the Debtor, and both entities obtained such interest by filing a writ of attachment



1 against the Debtor. These entities are FMF Racing, which filed a writ of  
2 attachment against the Debtor in the amount of \$1,500,000, and Don Emler  
3 (together with FMF Racing, the "Secured Parties"), who filed a writ of attachment  
4 against the Debtor in the amount of \$802,333.33. True and correct copies of  
5 these writs of attachment are attached hereto as **Exhibit "1"**. Pursuant to  
6 California Code of Civil Procedure section 487.010, all of the Debtor's property  
7 within California is subject to attachment if there is a statutory method of levy for  
8 the property. The levy provisions contained in California Code of Civil Procedure  
9 section 488.300 *et seq.* provide for levy of substantially all assets of a corporation,  
10 with the exception of certain intellectual property. Thus, the Secured Parties have  
11 a collective claim against the Debtor in the amount of \$2,302,333.33, which is  
12 secured by all property of the Debtor's estate to which a writ of attachment may  
13 attach, including equipment, inventory, deposit accounts, and accounts receivable.

14 As set forth below and in the concurrently-filed Simo Decl., the  
15 interests of the Secured Parties in the Debtor's cash collateral is adequately  
16 protected by a substantial equity cushion on account of the assets of the Debtor.  
17 As of the Petition Date, the Debtor's assets have an estimated value of  
18 \$12,500,000. This consists of approximately \$25,000 in cash, \$700,000 in non-  
19 intercompany accounts receivable, \$290,000 in fixed assets, a 50% ownership in  
20 real property in North Carolina which interest is estimated to be valued at \$1.5  
21 million, and \$10 million in intellectual property. Simo Holdings owns the "So Cal"  
22 and "Fearless" trademarks. This equity cushion alone provides the Secured  
23 Parties with adequate protection. Further, even if this equity cushion was  
24 declining, the Secured Parties would be adequately protected by a combination of  
25 (a) the continued operation of the Debtor's business as well as the business of its  
26 wholly-owned subsidiary No Fear MX, Inc. ("NFMX") and its 97.75% owned  
27 subsidiary No Fear Retail Stores, Inc. ("NFRS"); and (b) the granting of a  
28 replacement lien on post-petition receivables to the extent of any diminution in

1 value of the Secured Parties' collateral as a result of the Debtor's use of cash  
2 collateral. The replacement lien would be on all post-petition assets in the same  
3 priority and to the same extent and validity as the Secured Parties interest.

4 Pending a final hearing on the Motion, the Debtor requests  
5 emergency authority to use cash collateral in accordance with a eight-week  
6 budget (the "Budget" or the "Forecast") attached to the Simo Decl. as Exhibit "4".<sup>1</sup>

### 7 III.

### 8 BACKGROUND

#### 9 A. Initial Business

10 The Debtor was incorporated as No Fear, Inc. in 1990 (changing its  
11 name to Simo Holdings, Inc. in March 2009). The Debtor's primary activities were  
12 the design, manufacture and sale of casual apparel and accessories under the  
13 "No Fear" brand to wholesale accounts in the U.S., primarily department stores.  
14 The Debtor also licensed "No Fear" for the sale of products internationally. The  
15 popularity of the "No Fear" brand grew explosively into the mid 1990s, with annual  
16 revenues reaching approximately \$140 million in 1995.

#### 17 B. Shift in Distribution Strategy

18 Sales began to decline after 1995, as customers for "No Fear" and similar  
19 brands shifted from department stores to specialty retailers catering to the youth market.  
20 Profitability also declined, as department stores squeezed margins to make up for  
21 shrinking sales. Because of these developments, and because the "No Fear" brand  
22 appeared to be losing relevance in the core sports-oriented youth market, the Debtor  
23

---

24 <sup>1</sup> The Debtor also requests some flexibility in connection with the Budget - namely, that  
25 the Debtor be permitted to exceed the disbursements forecasted in the Budget by up to  
26 15% on a line-by-line basis and to exceed aggregate disbursements forecasted in the  
27 Budget by a total of 10%. The Debtor further requests that the balance of any unspent  
28 amounts on a weekly basis carry forward to be available to the Debtor in the following  
weeks.

1 changed its business model, terminating distribution of its products through department  
2 stores and other "big box" retailers in favor of lower volume, but more relevant and  
3 profitable, specialty retailers. As part of this shift in distribution strategy, the Debtor also  
4 decided to experiment with its own retail stores. The first "No Fear" retail store was  
5 opened in 1999, to sell both "No Fear" branded products and third party products. 19  
6 more stores were added by the end of 2004.

7 **C. Funding of Retail Store Growth -- Spy Optic IPO and Sale of**  
8 **International Rights**

9 By the end of 2004, it appeared to the Debtor's management that its  
10 retail store strategy was sound, and that there existed the opportunity to grow to  
11 several hundred stores. However, it understood that such growth would require  
12 significant capital investment, as each new store cost approximately \$250,000 to  
13 \$400,000 to open, primarily for leasehold improvements, fixtures and equipment,  
14 and inventory.

15 In December 2004, the Debtor took public its Spy Optic subsidiary  
16 and cashed out some of its Spy Optic shares to use to fund new store openings.  
17 (the Debtor had started Spy Optic in about 1999, to design, manufacture and sell  
18 sunglasses and sport goggles. Spy Optic grew to approximately \$35 million in  
19 annual revenues by the time of its IPO. From 2004 to 2009, the Debtor and its  
20 affiliates retained significant minority ownership of the company and "No Fear"  
21 retail stores became the single largest customer for Spy Optic products.)

22 In October 2005, the Debtor sold, for \$12.5 million, 50% of its rights to  
23 "No Fear" outside the U.S. (excluding rights to use "No Fear" for motocross  
24 products, which had been licensed to a third party). The rights were sold to Sports  
25 Direct International plc, a major European sporting goods retailer based in the  
26 United Kingdom. The sale was accomplished through the creation of a new British  
27 company, No Fear International Ltd., managed by a Sports Direct subsidiary and  
28 owned 50% by the Debtor and 50% by another Sports Direct subsidiary. The

1 Debtor used the sale proceeds primarily to fund growth of its "No Fear" retail  
2 stores.

3 **D. Formation of No Fear Retail Stores, Inc.**

4 As of September 2006, Simo Holdings was operating approximately  
5 30 "No Fear" stores. Simo Holdings set a target of 50 stores, a number that  
6 management believed would provide the critical mass necessary to show that "No  
7 Fear" could grow to a national chain of several hundred doors. With a 50-store  
8 "proof of concept," management believed that it would be in a position to attract  
9 significant financing, from private equity sources or possibly through an IPO, to  
10 fund an additional 50 to 100 stores. In anticipation of that future financing, Simo  
11 Holdings created a new wholly-owned subsidiary, NFRS and, in September 2006,  
12 transferred the retail store business to NFRS, including all related assets (except  
13 cash and inventory) and subject to all related liabilities and commitments, in  
14 exchange for 40,000,000 shares of NFRS common stock.

15 Following the transfer, Simo Holdings purchased both proprietary and  
16 third party products for NFRS, creating a payable from NFRS to Simo Holdings.  
17 Simo Holdings also provided support services including warehousing, design,  
18 accounting and production to NFRS. As a result, a portion of Simo Holding's  
19 shared overhead was allocated to NFRS. Simo Holdings also filed a consolidated  
20 tax return for all of its subsidiaries, creating a payable from NFRS to Simo  
21 Holdings for NFRS's portion of taxes.

22 In September 2008, Simo Holdings transferred ownership of the "No  
23 Fear" trademark to NFRS, together with associated copyrighted designs, and  
24 assigned to NFRS certain license contract rights related to "No Fear."

25 **E. Formation of No Fear MX, Inc.**

26 In about 2000, Simo Holdings granted to one of its employees, Jeffrey  
27 Surwall, a license to use "No Fear" for the design, production and sale of protective  
28 equipment for the sport of motocross. Mr. Surwall built the business to approximately

1 \$14 million in annual revenues. In July 2007, Simo Holdings purchased the assets of the  
2 business from Mr. Surwall for \$7 million. The business was acquired through a newly  
3 formed subsidiary, NFMX. The purchase price was to be paid out at established  
4 increments over a 5-year period. Following the acquisition, the Debtor provided support  
5 services for NFMX and a portion of the Debtor's shared overhead was allocated to  
6 NFMX.

7 The Debtor shares office and warehouse space with NFMX and  
8 NFRS in an office in Carlsbad, California, 92008. Both NRFS and NFMX filed  
9 chapter 11 bankruptcy petitions on February 24, 2011.

10 **F. Unsuccessful Financing Efforts**

11 Beginning in 2007 and continuing through 2010, the Debtor and  
12 NFRS pursued a series of efforts and transactions in order to raise capital to fund  
13 the growth of NFRS. These efforts and transactions included (i) in 2007 – 2008, a  
14 proposed reverse merger, combined with a public stock offering, with Orange 21  
15 Inc. (the parent company of Spy Optic), then listed on the NASDAQ, (ii) in 2008, a  
16 private placement of preferred stock, and (iii) in 2009 – 2010, a proposed reverse  
17 merger, combined with a public stock offering, with Gatorz Inc., a company listed  
18 on the Toronto Stock Exchange – Venture. Throughout this period, the Debtor  
19 and NFRS also had discussions regarding possible investment with dozens of  
20 private equity firms and other potential financing sources. None of these efforts  
21 were successful.

22 **G. Recent Financial Results**

23 The Debtor generated total revenues of approximately \$32,572,199  
24 for its fiscal year ended 2008. For its fiscal year ended 2009, the Debtor  
25 generated total revenues of approximately \$26,396,981. For its fiscal year ended  
26 2010, the Debtor generated total revenues of approximately \$22,204,927.

27 **H. Debt Structure**

1 The Debtor does not have any secured creditors with an interest in  
2 cash collateral other than the Secured Parties. As of the Petition Date, the total  
3 amount of these claims is \$2,302,333.33. As of the Petition Date, the Debtor has  
4 estimated unsecured debt in the approximate amount of \$14.6 million, primarily  
5 owed to trade vendors, suppliers, shippers, and other service providers.

6 **I. Equity Interests in the Debtor**

7 The Debtor's equity interests are held by numerous individuals,  
8 including the founders of the Debtor, Brian Simo (37.15%) and Mark Simo  
9 (38.20%). Approximately 27 other individuals hold the remaining 24.65% interest  
10 in the Debtor, the largest of which is Don Emler with 6.64%.

11 **J. Real Estate Leases and Store Closings**

12 As stated above, the Debtor currently leases office space in Carlsbad,  
13 California, which it shares with NFMX and NFRS.

14 **K. Employees**

15 In anticipation of NFRS merging with Gatorz Inc., all remaining  
16 operations and employees of Simo Holdings were transferred to either NFRS or  
17 NFMX in September 2010. As a result, all employees were placed on the payrolls  
18 of either NFRS or NFMX. The Debtor thus has no employees.

19 **L. Assets and Income**

20 As of the Petition Date, Simo Holdings' assets have an estimated  
21 value of \$12,500,000. This consists of approximately \$25,000 in cash, \$700,000  
22 in non-intercompany accounts receivable, \$290,000 in fixed assets, a 50%  
23 ownership in real property in North Carolina which interest is estimated to be  
24 valued at \$1.5 million, and \$10 million in intellectual property. Simo Holdings  
25 owns the "So Cal" and "Fearless" trademarks.

26 As more fully detailed in the Budget attached to the Simo Decl as  
27 Exhibit "4", Simo Holdings' income on a monthly basis is approximately \$25,000,  
28



1 consisting of rental income from the property it has an interest in North Carolina.  
2 Its expenses are less than this amount.

3 IV.

4 **FACTORS PRECIPITATING CHAPTER 11 FILING**

5 As a consumer business selling discretionary items, the Debtor, and  
6 NFRS and NFMX, have been negatively impacted by the recession that hit the  
7 United States starting in late 2007. The Debtor has been disproportionately  
8 impacted by the downturn in consumer spending given (i) the discretionary nature  
9 of its products, (ii) its target customer and (iii) its geographic concentration. The  
10 Debtor's NFRS business consists of the sale of items which are discretionary  
11 purchases for consumers who have been disproportionately impacted by the  
12 downturn in consumer spending. The Debtor has traditionally targeted "blue  
13 collar" customers, who have been severely hurt by the housing and labor crises.  
14 Further, NFRS's retail stores are concentrated in California, Arizona and Nevada,  
15 three of the hardest hit areas in the United States.

16 As a result of these factors, NFRS has experienced declining  
17 comparable store sales and declining overall sales for the last three years. Sales  
18 declined approximately 20% in NFRS's fourth fiscal quarter of 2010 (ending  
19 August 31, 2010) compared to the fourth quarter of 2009, and same store sales  
20 were down approximately 12.0% in fiscal 2010. NFRS is bound by a number of  
21 long term leases with landlords who have generally been unwilling to renegotiate  
22 its leases to reflect the current lower market rates or the state of NFRS's business.

23 NFRS is also burdened by a significant amount of expenses as a  
24 result of the failed Gatorz transaction in 2009 and 2010. NFRS incurred  
25 approximately \$1,000,000 in professional fees including legal and accounting fees  
26 in the preparation of that transaction. Finally, NFRS has been unable to secure  
27 sufficient third party inventory for NFRS's retail stores due to its lack of financing.  
28 Lack of third party inventory, which serves as the primary traffic driver in NFRS's

1 stores, has created a negative downward spiral – the lack of inventory has  
 2 impaired store sales, which has further impacted cash flow, which, in turn, has  
 3 further impaired the Debtor's ability to secure third party inventory.

4 Having been unable to renegotiate leases with landlords, NFRS has already  
 5 closed a number of unprofitable stores in an attempt to mitigate its losses. The Debtor  
 6 anticipates continuing to attempt to secure third party financing, while pursuing a  
 7 reorganization that likely would result in a smaller store base, a reduction in corporate  
 8 overhead, and a focus on licensing of the Debtor's and NFRS's established brands in  
 9 order to create a smaller, profitable entity going forward.

#### 10 V.

#### 11 CASH COLLATERAL BUDGET/FORECAST

12 Attached to the Simo Decl. as Exhibit "4" is the Debtor's proposed  
 13 cash collateral operating budget for the next eight-week period (the "Budget")  
 14 which was prepared by the Debtor. See Simo Decl. The Budget, which is  
 15 conservative, shows that the Debtor can pay its expenses without additional  
 16 financing from a third party. Even so, the Debtor is currently in discussions with  
 17 third parties regarding post-petition financing, and the Debtor hopes to reach an  
 18 agreement on that within the next eight weeks. The Debtor's business is a  
 19 seasonal one, and the Debtor is currently in a traditionally slow period.

20 The Debtor has eliminated unnecessary expenses, and the Budget  
 21 takes into account the Debtor's cost-cutting measures. All payments described in  
 22 the Budget are necessary to maintain and continue the Debtor's operations, fund  
 23 administrative expenses, and allow the Debtor to move forward with its effort to  
 24 obtain post-petition financing to maximize the value of the Debtor's estate. Failure  
 25 to make payment in accordance with the Budget could result in immediate and  
 26 irreparable harm to the Debtor's operations, the value of the estate, and the  
 27 interests of creditors.  
 28



## VI.

**SCOPE OF REQUEST FOR USE OF CASH COLLATERAL**

The Debtor requests (i) pending a final hearing, emergency authority to use cash collateral to satisfy administrative expenses (including the payment of rent for its Carlsbad offices and warehouse) in accordance with the Budget and (ii) at the final hearing, final authority to use cash collateral through a final hearing to be set not less than 15 days after the interim hearing. See Budget attached to the Simo Decl. as Exhibit "4" and proposed Order attached hereto as **Exhibit "2"**.

The terms of the proposed interim Order are appropriate and do not include any provisions inappropriate for an interim agreement as described in the Local Bankruptcy Rules of the Southern District of California. Specifically, the proposed Order does not contain any of the provisions which this Court requires moving parties to alter the Court's attention to, as specified in the "Guidelines for Motions To Use Cash Collateral Or To Obtain Credit", which is Appendix D2 to the Local Rules of the United States Bankruptcy Court for the Southern District of California.

## VII.

**ARGUMENTS AND AUTHORITIES****A. The Relief Requested is Authorized by 11 U.S.C. § 363**

Section 363 of the Bankruptcy Code governs the Debtor's use of property of its estate. Section 363(c)(1) provides in pertinent part that:

If the business of the debtor is authorized to be operated under section . . . 1108 . . . and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

11 U.S.C. § 363(c)(1).

A debtor in possession has all the rights and powers of a trustee with respect to property of the estate, including the right to use property of the estate in

1 compliance with section 363 of the Code. 11 U.S.C. § 1107(a). Section 363(c)(2)  
 2 establishes a special requirement with respect to “cash collateral”, by providing  
 3 that the trustee or debtor in possession may not use, sell or lease “cash collateral”  
 4 under subsection (c)(1) unless (i) such entity that has an interest in such collateral  
 5 consents, or (ii) the court, after notice and a hearing, authorizes such use, sale or  
 6 lease.

7 “Cash collateral” is defined by the Code as follows:

8 [C]ash, negotiable instruments, documents of title,  
 9 securities, deposit accounts, or other cash equivalents  
 10 whenever acquired in which the estate and an entity  
 11 other than the estate have an interest and includes the  
 12 proceeds, products, offspring, rents, or profits of property  
 subject to a security interest as provided in section  
 552(b) of this title, whether existing before or after the  
 commencement of a case under this title.

13 11 U.S.C. § 363(a).

14 The definition of “cash collateral” set forth in section 363(a) refers to  
 15 section 552(b) of the Code, which provides:

16 Except as provided in sections 363, 506(c), 522, 544,  
 17 545, 547 and § 548 of this title, if the debtor and an entity  
 entered into a security agreement before the  
 commencement of the case and if the security interest  
 18 created by such security agreement extends to property  
 of the debtor acquired before the commencement of the  
 case and to proceeds, products, offspring, rents, or  
 19 profits of such property, then such security interest  
 extends to such proceeds, products, offspring, rents or  
 20 profits acquired by the estate after the commencement of  
 the case to the extent provided by such security  
 21 agreement and by applicable non-bankruptcy law, except  
 22 to the extent that the court, after notice and a hearing and  
 based on the equities of the case, orders otherwise.

23 11 U.S.C. § 552(b)(1).

24 It is universally acknowledged that the debtor’s cash “is the life blood  
 25 of the business” and the bankruptcy court must assure that such life’s blood “is  
 26 available for use even if to a limited extent”. In re Mickler, 9 B.R. 121, 123 (Bankr.  
 27 M.D. Fla. 1981). Courts typically authorize a debtor to use cash collateral to  
 28

1 continue its operations so long as the interests asserted by affected creditors in  
2 such cash are adequately protected.

3 As this Motion establishes, the standards for authorizing the Debtor to  
4 utilize cash collateral are satisfied in this case because (i) there is a sufficient  
5 equity cushion protecting the Secured Parties' interest (this alone provides more  
6 than sufficient basis for authorization of the requested use of cash collateral);  
7 (ii) the Debtor's and NFRS's ongoing business operations will adequately protect  
8 and preserve the value of the Secured Parties' cash collateral, and (iii) the  
9 Secured Parties will be further adequately protected by the grant of replacement  
10 liens on post-petition inventory, fixture, furniture, equipment, accounts receivable  
11 and proceeds to the extent of any diminution in the value of the Secured Parties'  
12 cash collateral.

13 **B. Secured Parties' Interest in Cash Collateral Will Be**  
14 **Adequately Protected by a Substantial Equity Cushion,**  
15 **Even If There Is Diminution in Cash Collateral**  
16 **Under the Proposed Budget**

17 As noted above, a debtor's authority to use cash collateral is typically  
18 conditioned on providing "adequate protection" to entities that assert an interest in  
19 such cash. 11 U.S.C. § 361. Although the term "adequate protection" is not  
20 defined in the Bankruptcy Code, Section 361 provides the following three non-  
21 exclusive examples of what may constitute adequate protection:

- 22 (1) requiring the trustee to make a cash payment or  
23 periodic cash payments to such entity, to the extent that  
24 the . . . use . . . under section 363 of this title . . . results  
in a decrease in the value of such entity's interest in such  
property.
- 25 (2) providing to such entity an additional or  
26 replacement lien to the extent that such . . . use . . .  
27 results in a decrease in the value of such entity's interest  
28 in such property; or

(3) granting such other relief . . . as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

Neither section 361 nor any other provision of the Code defines the nature and extent of "interest in property" of which a secured creditor is entitled to adequate protection under section 363. However, the statute plainly provides that a qualifying interest demands protection only to the extent that the use of the creditor's collateral will result in a decrease in "the value of such entity's interest in such property". United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988).

Timbers teaches that a secured creditor is entitled to "adequate protection" only against the diminution in value of the collateral securing its allowed secured claim. Where the Secured Parties have writs of attachment in the total amount of \$2,302,333.33, which is secured by approximately assets worth in excess of \$12 million, it follows that the Secured Parties' interest in cash collateral is adequately protected. Moreover, separate and independent of any question of diminution in value, a secured creditor has no right to preservation of the equity cushion in its collateral. The Supreme Court in Timbers determined that the property interest the Debtor must adequately protect is the lien that secures the creditor's claim. Timbers, 108 S. Ct. at 630. Further, the value of the lien may not exceed the allowed amount of the secured claim. Accordingly, the property interest of an oversecured creditor (the Secured Parties, in this case) that the Debtor must adequately protect, namely the lien value, is the allowed amount of the secured claim and does not include the equity cushion. In In re Alyucan Interstate Corp, 12 B.R. 803 (Bankr. D. Utah 1981), the court ruled that an equity cushion is not a requirement of adequate protection because a secured creditor is only entitled to protection against a decline in the value of its lien. Accordingly, the existence of an equity cushion (the value of the property above the lien) is not a

1 necessary component of adequate protection. The court reasoned that section  
 2 361 speaks not in terms of preserving equity, but in terms of compensating for any  
 3 "decrease in the value of [an] interest in property". *Id.*, at 803. The Supreme  
 4 Court's decision in *Timbers* confirms the interpretation of section 361.

5 **C. Emergency Authority to Use Cash Collateral is Warranted**  
 6 **Under 11 U.S.C. § 363(c)(3) and Rule 4001(b) to Allow the Debtor**  
 7 **to Operate its Business.**

8 The Debtor has requested an emergency hearing to consider the  
 9 relief requested in this Motion. Section 363(c)(3) and Rule 4001(b)(2) require the  
 10 Court to schedule a cash collateral hearing in accordance with the needs of the  
 11 debtor and conduct a preliminary hearing for the purpose of authorizing the use of  
 12 cash collateral to the extent necessary to avoid irreparable harm to the Debtor.  
 13 Section 363(c)(3) mandates that "[a]ny hearing [on the use of cash collateral] . . .  
 14 shall be scheduled in accordance with the needs of the debtor". The Ninth Circuit  
 15 has recognized that emergency relief is often crucial to the success of a corporate  
 16 reorganization:

17 We realize that "in certain circumstances, the entire  
 18 reorganization effort may be thwarted if emergency relief  
 19 is withheld" and that reorganization under the Bankruptcy  
 20 Code "is a perilous process, seldom more so than at the  
 21 outset of the proceedings when the debtor is often  
 22 without sufficient cash flow to fund essential business  
 operations". It is for this very reason that Congress  
 specified that hearings concerning the use of cash  
 collateral "shall be scheduled in accordance with the  
 needs of the debtor". 11 U.S.C. § 363(c)(3).

23 In re Center Wholesale, Inc., 759 F.2d 1440, 1449 n. 21 (9<sup>th</sup> Cir. 1985) (citations  
 24 omitted).

25 In the present case, emergency use of cash collateral by the Debtor,  
 26 pending a final hearing, is necessary to prevent immediate and irreparable harm to  
 27 the Debtor and its creditors. Absent such use, the Debtor will have little or no  
 28

1 funds from which to conduct its operations, and may be forced to permanently  
2 discontinue its business to the detriment of all creditors.

3 As such, the Debtor requests that the Court permit the Debtor to use  
4 cash collateral to the extent necessary to avoid irreparable harm pending a final  
5 hearing in accordance with the Budget and the Order, schedule a final hearing on  
6 this Motion under Rule 4001(b)(2), following the final hearing authorizing the  
7 Debtor to use cash collateral in order to pay its ordinary and necessary operating  
8 expenses and generally operate its business in accordance with the Budget.

### 9 VIII.

#### 10 THE BANK WITH WHICH THE DEBTOR HAS 11 BANK ACCOUNTS MUST HONOR THIS ORDER

12 The Debtor has four accounts with California Bank and Trust and one  
13 with Ford.<sup>2</sup> In order to give effect to this Court's order authorizing the Debtor's Use  
14 of Cash Collateral pursuant to this Motion, it is necessary that the Court direct  
15 California Bank and Trust and Ford Advantage to comply with the order, and abide  
16 by requests for use of funds by the Debtor. The Court may issue such an order  
17 pursuant to section § 105 of the Bankruptcy Code, which authorizes the Court to  
18 issue "any order, process, or judgment that is necessary or appropriate to carry  
19 out the provisions of this title".  
20  
21

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22  
23 <sup>2</sup> Concurrently herewith, the Debtor has filed its First Day Motion for Order Authorizing  
24 Debtor to Maintain Certain Active Bank Accounts and Cash Management System, as  
25 Modified, and Continue Use of its Existing Business Forms (the "Cash Management  
26 Motion"). The Cash Management Motion contains a more detailed discussion of the  
27 Depository Account. In general, the Debtor requests authority to continue its existing  
28 cash management/banking system as described above, with the modification that  
California Bank and Trust and Ford Advantage be precluded from asserting control over  
or otherwise sweeping (or transferring in any manner) funds from the Debtor's accounts  
for any purpose.

IX.

**NOTICE**

The Debtor intends to provide notice of this Motion by overnight mail, e-mail, facsimile, or hand delivery on (i) the Office of the United States Trustee, (ii) the twenty largest unsecured creditors, (iii) the Secured Parties, (iv) California Bank and Trust, (v) Ford Advantage, and (vi) any party requesting special notice.

X.

**CONCLUSION**

Based on the foregoing, the Debtor respectfully requests that the Motion be granted, that the proposed Order be entered, and that this Court grant such other and further relief as the Court deems just and proper.

DATED: February 24, 2011

**SulmeyerKupetz**  
A Professional Corporation

By: 

David S. Kupetz  
Steven F. Werth  
(Proposed) Bankruptcy Counsel for Simo  
Holdings, Inc., Debtor and Debtor in  
Possession



**EXHIBIT “1”**



20

Code of Civ. Proc., § 468.010

**EXHIBIT “2”**

CSD 1001A [11/15/04]

Name, Address, Telephone No. &amp; I.D. No.

David S. Kupetz (CA Bar No. 125062)

dkupetz@sulmeyerlaw.com

Steven F. Werth (CA Bar No. 205434)

swerth@sulmeyerlaw.com

**SulmeyerKupetz**

A Professional Corporation

333 South Hope Street, Thirty-Fifth Floor

Los Angeles, California 90071-1406

Telephone: 213.626.2311

Facsimile: 213.629.4520

**UNITED STATES BANKRUPTCY COURT**

SOUTHERN DISTRICT OF CALIFORNIA

325 West "F" Street, San Diego, California 92101-6991

In Re.

SIMO HOLDINGS, INC., a California corporation,

Debtor.

BANKRUPTCY NO. 11-02898-11

Date of Hearing: March 1, 2011

Time of Hearing: 9:00 a.m.

Name of Judge: Hon. Margaret M. Mann

**ORDER ON DEBTOR'S EMERGENCY FIRST DAY MOTION AUTHORIZING DEBTOR'S USE OF CASH COLLATERAL ON AN INTERIM BASIS AND SETTING FINAL HEARING**

**IT IS ORDERED THAT** the relief sought as set forth on the continuation pages attached and numbered two (2) through 2 with exhibits, if any, for a total of 2 pages, is granted. Motion/Application Docket Entry No. \_\_\_\_\_

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DATED:

\_\_\_\_\_  
Judge, United States Bankruptcy Court

Signature by the attorney constitutes a certification under Fed. R. of Bankr. P. 9011 that the relief in the order is the relief granted by the court.

Submitted by:

**SulmeyerKupetz**, A Professional Corporation  
(Firm name)

By: /s/ Steven F. Werth

Attorney for ☒ Movant ☐ Respondent

Simo Holdings, Inc., Debtor and Debtor in Possession

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CSD 1001A [11/15/04] (Page 2)

ORDER ON DEBTOR'S EMERGENCY FIRST DAY MOTION AUTHORIZING DEBTOR'S USE OF CASH  
COLLATERAL ON AN INTERIM BASIS AND SETTING FINAL HEARING

DEBTOR: SIMO HOLDINGS, INC., a California corporation,

CASE NO: 11-02898-11

The emergency motion (the "Motion") filed by Simo Holdings, Inc. (the "Debtor") on February 25, 2011, requesting interim and final orders authorizing use of cash collateral and granting replacement liens in connection therewith came on for initial hearing before this Court on March 1, 2011. Appearances at the hearing are reflected in the record. The Court considered the papers filed in this matter and the facts and circumstances of this case. Based on the foregoing, good cause having been established for granting the Motion as set forth below, and in order to prevent immediate and irreparable harm to the bankruptcy estate,

IT IS HEREBY ORDERED THAT:

1. The Motion is granted on an interim basis as set forth herein.
2. A Final Hearing on the Motion shall be held on \_\_\_\_\_, 2011, at \_\_\_\_\_, in Courtroom \_\_\_\_\_ of the above-entitled Court (the "Final Hearing"). The Debtor may file supplemental papers with respect to the Motion. The Motion shall be filed by \_\_\_\_\_, 2011. Any opposition to the Motion shall be filed and received by \_\_\_\_\_ on \_\_\_\_\_, 2011, such that it is received by the Court and counsel for the opposing party, if any, by the close of business on said date.
3. Pending the Final Hearing, the Debtor is authorized to use cash collateral in accordance with the cash expense budget (the "Budget") attached to the Omnibus Declaration Mark Simo in support of "First Day" Motions as Exhibit "4". During the period covered by the Budget, the Debtor shall be permitted to exceed disbursements forecasted in the Budget by not more than 15% on a line-by-line basis and by not more than 10% with respect to the total disbursements forecast in the Budget. Any disbursement amount available under the Budget and not used during the designated period is saved and preserved and shall be available for use during any subsequent period.

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